

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

PAUL A. REDD, JR.,

Plaintiff,

v.

MICHAEL D. DALEY,

Defendant.

Case Number C 98-20429 JF (HRL)

ORDER¹ (1) GRANTING
DEFENDANT'S MOTION FOR
LEAVE TO FILE A MOTION FOR
RECONSIDERATION;
(2) VACATING TRIAL AND
PRETRIAL DATES; AND
(3) DENYING WITHOUT
PREJUDICE ALL OTHER PENDING
MOTIONS

[re: docket nos. 148, 149, 152, 153, 154,
155, 162, 165, 168, 169, 171, 172]

All of the motions currently pending in this case are addressed as follows:

I. DEFENDANT'S MOTION FOR LEAVE TO SEEK RECONSIDERATION

Plaintiff Paul A. Redd, Jr. ("Redd"), a state prisoner proceeding *pro se*, filed this action following an incident that occurred while he was being transported from the Security Housing Unit at Pelican Bay State Prison to the prison law library. Redd was one in a line of inmates

¹ This disposition is not designated for publication in the official reports.

1 whose hands were cuffed behind them and who were attached at intervals to a single escort
2 chain. Redd alleges that Defendant Michael D. Daley (“Daley”), a correctional officer, unhooked
3 Redd from the escort chain and then deliberately kicked the chain into Redd’s path, causing him
4 to fall. Redd claims to have suffered significant injuries as a result of falling while his hands
5 were cuffed behind his back, including injuries to his knee and tooth. Redd sued Daley and
6 several other prison personnel, asserting Section 1983² claims for deliberate indifference in
7 violation of the Eighth Amendment and retaliation in violation of the First Amendment, as well
8 as state law claims.

9 On April 9, 1999, the Court issued an order granting in part and denying in part
10 Defendants’ motion to dismiss, concluding in relevant part that Redd had exhausted his
11 administrative remedies with respect to several of the individual defendants, including Daley.
12 On October 25, 2004, the Court issued an order granting in part and denying in part Defendants’
13 motion for summary judgment. The Court granted summary judgment with respect to the
14 deliberate indifference claim, the retaliation claim, and the state law claims. However, the Court
15 concluded that Redd’s allegations fairly could be read to state a claim against Daley for use of
16 excessive force in violation of the Eighth Amendment, and that there was a triable issue of
17 material fact as to whether Daley in fact used excessive force. The Court permitted the action to
18 go forward only with respect to the Eighth Amendment excessive force claim against Daley.

19 Daley subsequently filed a renewed motion for summary judgment, asserting that his
20 conduct did not constitute excessive force and that he was entitled to qualified immunity. The
21 Court denied that motion in an order issued July 17, 2007, again concluding that Redd had raised
22 a triable issue of material fact as to whether Daley used excessive force in violation of the Eighth
23 Amendment.

24 Daley seeks leave to file a motion for reconsideration (docket no. 149). He points out
25 that when the Court concluded in 1999 that Redd had exhausted administrative remedies with
26 respect to Daley, Redd’s Eighth Amendment claim was framed solely as a claim for deliberate

27
28 ² 42 U.S.C. § 1983.

1 indifference. It was not until the Court issued its order in 2004 that the claim for the first time
2 was framed as one for excessive force. As a result, the Court never has considered whether Redd
3 exhausted his administrative remedies with respect to his excessive force claim. Moreover, the
4 case law on administrative exhaustion has developed significantly since the Court addressed the
5 issue of exhaustion in 1999. Specifically, the Supreme Court has clarified that a prisoner must
6 exhaust administrative remedies even when the relief sought – e.g., monetary damages – cannot
7 be granted by the administrative process. *Booth v. Churner*, 532 U.S. 731, 734 (2001). The
8 Supreme Court further has clarified that “proper exhaustion” of administrative remedies is a
9 prerequisite to federal suit, defining that term as follows: “Proper exhaustion demands
10 compliance with an agency’s deadlines and other critical procedural rules.” *Woodford v. Ngo*,
11 548 U.S. 81, 90-91(2006). Daley contends that Redd did not exhaust administrative remedies
12 with respect to his excessive force claim, and requests leave to file a renewed motion to dismiss
13 on this basis.

14 The Court concludes that Daley has demonstrated good cause for seeking reconsideration,
15 and therefore will order Daley to file his proposed renewed motion to dismiss within seven days
16 of the date of this order. The Court further concludes that there is a reasonable possibility that
17 Daley’s proposed renewed motion to dismiss may be meritorious. Accordingly, the Court will
18 vacate the trial date and the pretrial conference date so that the motion may be briefed and
19 considered in an orderly fashion. In the event that the motion is denied, the Court will reset the
20 case for trial.

21 II. REMAINING MOTIONS

22 There are a number of other outstanding motions pending before the Court, listed as
23 follows:

24	Docket No. 148:	Redd’s motion for appointment of a medical expert
25	Docket No. 152:	Redd’s motion for an order authorizing him to make collect calls
26	Docket No. 153:	Redd’s motion to vacate the scheduling order
27	Docket No. 154:	Redd’s motion for a hearing on the propriety of the physical examination conducted by Daley’s expert
28	Docket No. 155:	Redd’s motion for an order prohibiting Daley from deposing Redd’s witnesses
	Docket No. 162:	Daley’s motion to exclude testimony from non-party witnesses who refused to comply with deposition subpoenas

Docket No. 165: Redd's motion for a telephonic conference and for a stay of all scheduling deadlines
Docket No. 168: Redd's motion for leave to conduct expert discovery and motion to compel discovery from Daley's expert
Docket No. 169: Redd's motion for production of documents
Docket No. 171: Redd's motion for evidentiary hearing and for sanctions
Docket No. 172: Redd's motion for leave to seek production of additional documents

In light of the Court's decision to permit Daley to file a renewed motion to dismiss, and the possibility that Daley will prevail on such motion, the Court will deny all of the above pending motions without prejudice. Any or all of the motions may be reasserted in the event that Daley's motion is denied and the trial is rescheduled.

III. ORDER

- (1) Daley's motion for leave to seek reconsideration filed at docket no. 149 is GRANTED. Daley shall file his proposed motion to dismiss for failure to exhaust administrative remedies within seven days of the date of this order. Redd shall file any opposition within thirty days. Daley may file a reply within fourteen days. The matter thereafter will be taken under submission without oral argument;
- (2) The trial date and pretrial conference date are VACATED;
- (2) All other pending motions, specifically docket nos. 148, 152, 153, 154, 155, 162, 165, 168, 169, 171 and 172, are DENIED WITHOUT PREJUDICE. Those motions may be reasserted in the event that Daley's renewed motion to dismiss is denied and the trial is rescheduled.

DATED: 9/24/08


JEREMY FOGEL
United States District Judge

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